Lincoln Technical Institute, Inc. *and* Lincoln Technical Institute Federation of Teachers, Local 2322, A.F.T., AFL-CIO. Case 22-CA-9769

May 27, 1981

DECISION AND ORDER

This case presents the novel question of whether an alleged discriminatee, who did not file an unfair labor practice charge, who did not seek to intervene at any stage of the proceeding, and who did not participate in any manner as a party to the proceeding, may nevertheless file exceptions to the decision of an administrative law judge in the absence of exceptions from any party. We hold that he may not.

On the basis of charges filed by the American Federation of Teachers Local 2322, the complaint in this case alleged, *inter alia*, that Respondent Lincoln Technical Institute, Inc., violated Section 8(a)(3) and (1) of the Act by discharging several instructors because they participated in a work stoppage to protest disciplinary action taken by Respondent. On February 6, 1981, after a hearing, Administrative Law Judge Raymond P. Green issued a Decision dismissing the complaint in its entirety. Pursuant to the Board's Rules and Regulations, the time for filing exceptions to that Decision expired on March 2, 1981.

On the following day the Board received a telegram from Leonard Giacalone, one of the alleged discriminatees, stating that he "would like to file an appeal from the decision of Judge Green as pertains to me."

Our dissenting colleague relies upon the "special status" the Board has accorded to alleged discriminatees, and upon their right under Section 10(f) of the Act to appeal to an appropriate court of appeals from any final Order of the Board by which they are aggrieved, to permit Giacalone to file exceptions to the Administrative Law Judge's Decision. We find that a contrary conclusion is compelled by the language of the Act, by our Rules and Regulations, and by our policies concerning the administration of justice, including the need for certainty and finality of Board processes.

Although Section 10(c) of the Act does not directly specify who may except to a decision of an administrative law judge, the language concerning exceptions appears in the same sentence that requires the administrative law judge's decision and proposed order "to be served on the parties to the proceeding."[1] Since the statute is clear that an administrative law judge's decisions need be served only on the parties, it would be anomalous indeed for us to hold that discriminatees may file exceptions to a decision of which they are not entitled to receive notice. Moreover, given no requirement for notice to alleged discriminatees, it would be virtually impossible to enforce the strict time limits for filing of exceptions imposed by the statute. To hold otherwise would create an extraordinary and unprecedented result for which we find no basis in either the statutory language or in congressional intent.[2]

In addition, the due process implications of permitting exceptions to be filed in these circumstances would be unacceptable. It is axiomatic that a person who is entitled to the opportunity to be heard is entitled to reasonable notice thereof. Thus, if the statute were held to grant alleged discriminatees the right to be heard before the Board on exceptions to a decision of an administrative law judge, due process would then seem to require them to receive notice of all such decisions—which would be both unwarranted and administratively infeasible. Further, Member Jenkins points to no authority to support his extraordinary reading of the statute as permitting alleged discriminatees to participate at this juncture in Board proceedings, but no earlier. More importantly, however, alleged discriminatees who desire to participate in unfair labor practice proceedings relating to their discharge or discipline have every right to do so. They may file unfair labor practice charges with the Board and thereby become a party to any proceedings resulting from these charges, even if additional charges are filed by another person on their behalf. In addition, even without filing charges, alleged discriminatees may move to intervene, thereby becoming parties to the proceedings. In either such event, the alleged discriminatee becomes entitled to notice of the hearing on the complaint, to an opportunity to be heard, to notice of the decision, and to the opportunity to file exceptions thereto.

Giacalone never filed unfair labor practice charges concerning his discharge. He never sought to intervene in the proceedings relating to the

[1] Our Rules and Regulations provide that "any party may (in accordance with sec. 10(c) of the act . . .) file with the Board in Washington, D.C., exceptions to the administrative law judge's decision or to any other part of the record or proceedings" Sec. 102.46(a), Rules and Regulations, Series 8, as amended. It is not argued that Giacalone is a "party" within the meaning of Sec. 102.8 of our Rules and Regulations.

[2] Individual discriminatees, such as Giacalone, may appeal to an appropriate court of appeals from a Decision and Order of the Board by which they are aggrieved. Such appeals are specifically provided for by Sec. 10(f) of the Act. Nothing in the court of appeals' decisions cited in fn. 5 of Member Jenkins' dissent suggests that the specific authorization provided by Sec. 10(f) mandates, or even justifies, participation by nonparties at earlier stages of Board proceedings. We thus fail to understand what "court precedent" he suggests that we ignore in our refusal to blur the distinction between "parties" referred to in Sec. 10(c) and "aggrieved person[s]" referred to in Sec. 10(f).

charges that were filed in his behalf by the Union. Having thus chosen to rest upon the representation provided him by the Union and the General Counsel, he should not now be heard to complain of his dissatisfaction with that representation. *Unga Painting Corporation*, 237 NLRB 1306 (1978), relied upon by Member Jenkins in his dissent, is inapposite and does not require a contrary result. The issue in that case involved the status of a discriminatee as a witness at a hearing, not his rights as a party to the proceeding. Nothing in the opinion suggests a discriminatee's right to file exceptions with the Board.

We therefore hold that a nonparty discriminatee has no right to file exceptions to a decision of an administrative law judge that is not excepted to by any party. Since no exceptions have been filed to the Administrative Law Judge's Decision in this case, we shall order his Decision adopted, and the complaint dismissed in its entirety.

ORDER

It is hereby ordered that the complaint in this proceeding be, and it hereby is, dismissed in its entirety.

MEMBER JENKINS, dissenting:

I would grant the request of Leonard Giacalone for an extension of time to file exceptions to the Administrative Law Judge's Decision on the related grounds that, as an alleged discriminatee, he is authorized to file exceptions to an intermediate decision under Section 10(c) of the Act, and that he is to be considered an "aggrieved person" under Section 10(f) of the Act who can seek review of the Board's final Order in a United States court of appeals.

This proceeding is based on a charge filed by Local 2322 of the American Federation of Teachers (hereinafter Local 2322) alleging, *inter alia*, that a number of instructors employed by Respondent had been unlawfully discharged. Leonard Giacalone, one of these alleged discriminatees, did not formally appear as a charging party, relying exclusively on the sufficiency of the charge filed by Local 2322 on his behalf. Subsequent to an investigation, the issuance of a complaint, and a hearing before an Administrative Law Judge, the latter issued a Decision in this proceeding recommending that the complaint be dismissed in its entirety. Neither the General Counsel nor Charging Party Local 2322 has filed exceptions to this Decision, and on the last day for filing exceptions Giacalone addressed to the Board a telegram stating that he would like to file an appeal on his own behalf.

My colleagues apparently rely on a strict reading of Sections 102.8 and 102.46(a) of the National Labor Relations Board Rules and Regulations and Statements of Procedure, Series 8, as amended, for the proposition that the right to file exceptions is limited to parties. This literal construction, however, ignores the special status granted to alleged discriminatees who, although not formally charging parties, are to be accorded many of the rights granted to such parties. As stated in *Unga Painting Corporation*, 237 NLRB 1306, 1307 (1978):

> A discriminatee who has not filed his own charge is not a party within the Board's definition but . . . in a real sense has been regarded as a party in a long line of Board decisions. His interest in a Board proceeding when the charge is filed on his behalf by a union is . . . scarcely less than that of an individual charging party who is also a discriminatee.

This special status granted alleged discriminatees is not premised on the relationship of the alleged discriminatee to the charging party,[3] but derives from the fact that it is the alleged discriminatee's Section 7 rights that are being safeguarded, and with it the public right and interest in upholding the purposes of the National Labor Relations Act.[4] While the General Counsel is granted primary responsibility for litigating unfair labor practice complaints, this responsibility has never been exercised to deny charging parties the right to participate in unfair labor practice proceedings or independently to file exceptions to administrative law judges' decisions. Where both the General Counsel and the charging party choose not to contest the dismissal of an unfair labor practice complaint, an alleged discriminatee should not be precluded from appealing an adverse intermediate decision of this Agency; he is a real party in interest. In this regard, I note that Section 10(c) of the Act, as it relates to exceptions, does not specifically indicate who may file such exceptions.

The more restrictive ruling by my colleagues, moreover, is essentially inconsistent with the right of review contained in Section 10(f) of the Act. Under this section, "any person aggrieved" by a final Order of the Board may obtain review of such Order in a United States court of appeals. The term "any person aggrieved" has been interpreted to include alleged discriminatees who are not charging parties.[5] Accordingly, under this interpre-

[3] There is no limitation on who may file unfair labor practice charges on behalf of employees. See *Bagley Produce, Inc.*, 208 NLRB 20, 21 (1973).

[4] See, generally, *National Licorice Company* v. *N.L.R.B.*, 309 U.S. 350, 362 (1940).

[5] *Hamilton* v. *N.L.R.B.*, 160 F.2d 465 (6th Cir. 1947); *Stewart Die Casting Corporation* v. *N.L.R.B.*, 132 F.2d 801 (7th Cir. 1942); *Jacobsen* v. *Continued*

tation, once the Administrative Law Judge's Decision herein becomes a final Order of the Board, which it automatically shall become under Section 10(c), Giacalone may obtain court review of this Board's final Order. Section 10(f), however, limits the arguments available to Giacalone on review, by incorporating the court procedure stated in Section 10(e), including:

> No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances.

In view of the above, Giacalone may be constrained to argue before any reviewing court that he should not be limited in his arguments before the court due to the "extraordinary circumstance" that the Board refused to hear his objections. His only alternative is to concede that he has not been able to preserve any argument on appeal. If Giacalone's exceptions are without merit, we should make this determination prior to court review. If they are meritorious, we should not require the court's reversal or remand. Allowing Giacalone the right to present his arguments before the Board is not only a more rational appellate procedure, but also the one clearly intended by the interplay of the subsections of Section 10.[6]

In addition, granting all discriminatees the right to file exceptions is neither administratively burdensome nor inequitable. The absence of precedent indicates that such a request is likely to remain an isolated occurrence. By foreclosing this right, the majority specifically invites, and thereby needlessly encourages, discriminatees to file their own charges, and substantially clutter our proceedings. To the extent that a discriminatee has relied on others for the presentation of his case, this should not estop him from appealing adverse decisions when those who have been acting on his behalf withdraw from the proceeding.[7] Finally, a respondent may not successfully claim that allowing such an appeal is violative of his due process rights, as the complaint and the hearing have clearly apprised him of the status of the alleged discriminatee and his interest in the proceedings.

In granting an alleged discriminatee who is not a charging party the right to file exceptions to the Board, I would not accord him all the rights of a full party to the proceeding. He should not be able to appear formally to present his own witnesses and conduct cross-examination or to be considered a party for the purpose of service of process. An alleged discriminatee who seeks such full party status to our proceedings may either file a separate charge, or file a timely request for intervention in the existing proceeding. However, I would grant him the limited right to contest the complete dismissal of his case prior to our final Order.

I also consider Giacalone's request timely filed, even though it was received after the time for filing exceptions had expired. Giacalone adequately explained his delay in filing the request, stating that he had not been advised by the General Counsel of his rights of appeal. I further note that he was not served with a copy of the Administrative Law Judge's Decision and therefore did not receive prompt notice of the running of time for filing exceptions.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge: Pursuant to a charge filed by Lincoln Technical Institute Federation of Teachers, Local 2322, A.F.T., AFL-CIO, herein called the Union, against Lincoln Technical Institute, Inc., herein called the Company or Respondent, which charge was filed on February 15, 1980, the Regional Director for Region 22 issued a complaint and notice of hearing on April 11, 1980. In substance, the complaint alleged that Respondent, on February 11, 1980, indefinitely suspended, pending discharge, Daniel Wigder, Theodore Gerrick, and Richard O'Neil because of their membership in, and activities on behalf of, the Union. The complaint also alleged that, on February 13, 1980, the instructors employed by Respondent engaged in an unfair labor strike in protest over the suspensions of the above-named individuals, and that, on or about February 14, 1980, Respondent discharged all of the bargaining unit employees. It finally was alleged that Respondent, on or about February 15, 1980, rescinded its collective-bargaining agreement with the Union and withdrew recognition from the Union.[1]

The hearing in this matter was heard before me on October 22 and 23 and November 3, 4, and 5, 1980. Upon the entire record, including my observation of the demeanor of the witnesses, and after due consideration of

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N.L.R.B., 120 F.2d 96 (3d Cir. 1941). Cf. *Anthony* v. *N.L.R.B.*, 132 F.2d 620 (9th Cir. 1942).

[6] While the majority holds that only parties who are entitled to receive notice of adverse determinations may be allowed to file exceptions, as a result of due process implications, their position ignores court precedent implicitly acknowledging no such due process impediment to review of final, as opposed to intermediate, Board decisions. See cases cited in fn. 5. In any event, the majority's ruling hardly advances the due process interests of discriminatees such as Giacalone.

[7] Frequently, and probably in a majority of our cases, the charging party relies exclusively on representation by the General Counsel, and does not actively participate in the presentation of his case. Despite the acceptance by the charging party of such exclusive representation, we do not estop him from excepting to an adverse decision which the General Counsel is willing to accept.

[1] In the General Counsel's brief, he withdrew the allegation of the complaint wherein it was alleged that, on or about February 11, 1980, Respondent impliedly warned its employees that they would suffer economic reprisals if they remained active in the Union or if they became or remained members of or gave any assistance or support to it.

the excellent briefs by the General Counsel and Respondent, I make the following:

FINDINGS OF FACT

I. JURISDICTION

The Company is engaged in the business of operating technical schools in various locations throughout the United States. Its corporate headquarters is located at 10 Rue Circle, West Orange, New Jersey, and it operates a school at 2299 Vaux Hall Road, Union, New Jersey, which is the school involved in the present dispute. The parties agree that the Company annually provides and performs educational services valued in excess of $1 million, of which educational services valued in excess of $50,000 are provided and performed within States of the United States other than the State of New Jersey. The complaint alleges and the answer admits that the Company is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

II. THE LABOR ORGANIZATION INVOLVED

The complaint alleges, the answer admits, and I find that Local 2322 is, and has been at all times material herein, a labor organization with the meaning of Section 2(5) of the Act.

III. THE COLLECTIVE-BARGAINING RELATIONSHIP

The Union was certified as the collective-bargaining agent of Respondent's instructors in 1972. The first president of the Local Union was Daniel Wigder. Thereafter in 1975, Jack Schuster was elected as the Union's president, but he stepped down in or about January 1978, and was succeeded by Theodore Gerrick, who had been a shop steward at the time.

The most recent collective-bargaining agreement between the Union and the Company runs for a term from September 15, 1977, to September 15, 1980. This agreement contains a number of provisions relevant to this proceeding as follows:

> Article I, Section 2—No Strike, No Lockout
>
> It is understood and agreed that the school will not lockout any employee covered hereby and the Union will not authorize or take part in any strike, sitdown, slowdown, or any other work stoppage or picketing of the school premises during the life of this agreement except as provided for in the terms and conditions of the National Labor Relations Act, as amended.
>
> The above section shall not apply when there is a failure by the school to comply with grievance settlements, arbitrator's decisions, or payments of salaries or fringe benefits thirty (30) days after the school receives written notice from the Union of the school's failure to comply.

* * * * *

> Article VIII—Discipline and Discharge
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> The school agrees to discipline or discharge an employee only for just cause.
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> Section 1. When the cause for discharge involves class room competency, a written notice shall be given to the employee following a discussion with his superior and shop steward at least ten (10) working days preceding his discharge. It is understood that Article VII, Section IV, will have been complied with before this procedure is initiated.
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> Section 2. With respect to disciplinary matters, the school shall promptly notify the Union upon effecting a suspension, disciplinary layoff or discharge. The school shall promptly deliver the Union copies of all written warnings issued to an employee. The employee and/or union representative shall have recourse to the grievance procedure. Where an employee is subject to disciplinary layoffs, suspension or discharge, Management will have a steward present.
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> Section 3. Each disciplinary notice shall not have any residual affect or be used as evidence in connection with any grievance or arbitration proceeding after twelve (12) months from date of issue.

In addition, the contract provides, in article IV, a grievance procedure culminating in final and binding arbitration for the resolution of disputes during the term of the agreement. Among the types of disputes covered by this procedure are acts of discipline and discharge.

The evidence establishes that during the life of the most recent collective-bargaining agreement there have been a number of disputes between the Union and the Company which have led to work stoppages or strikes. In November 1977, for example, a dispute arose concerning whether or not the Company had the right to switch instructors for the coverage of classes. In connection with this dispute the evidence indicates that the Company offered to have the dispute arbitrated, but that on December 7 and 8, 1977, a number of the instructors called in sick. At that time, Respondent perceived that the employees were engaging in a work stoppage and notified the Union that it would not pay sick leave to these employees unless they could establish that they were not able to come to work due to illness. Thereafter, on December 12, 1977, the Union, by Jack Schuster, sent a letter to Respondent advising the Company that the withholding of sick leave was contrary to the provisions of the collective-bargaining agreement and further indicating that there was a possibility of a strike after 30 days if the sick leave money was not paid. In response, the Company, on December 14, 1977, sent a letter to the Union which read as follows:

> Please be advised that any strike or other job action taken by your membership will constitute a violation of agreement between the union and the school, and, under the current laws of the United States, is illegal. You and your membership will be held accountable for any such actions to the fullest extent of the law.

A job action based on the school's failure to pay for alleged sick days to instructors who took part in an illegal job action on December 7, 1977, is an obvious continuation of that job action.

We urge you to submit the underlying dispute to arbitration on an expedited basis—which is the proper method under the law.

In May 1978 another dispute arose regarding the switching of instructors. On this occasion the Union did file a grievance and the matter was submitted to arbitration. However, the arbitrator decided, preliminarily, that the best method of resolving the particular dispute was to remand it to the parties for bargaining, while retaining jurisdiction in the event that the parties could not reach agreement on the matter. It appears that in this situation the parties were unable to reach an agreement and the matter was rescheduled for arbitration. However, the Company's attorney was not available for the scheduled date and requested a postponement. Thereafter, on or about May 31, 1978, when the Union refused to permit the Company to substitute an instructor for a refrigeration class, the Company canceled that class and rescheduled them for a later date. The Union thereupon accused the Company of engaging in a lockout which the Company denied. The instructors then commenced a strike which lasted about 3 weeks. In connection with that strike the Company sought and obtained a state court injunction and ultimately the parties did resolve the underlying dispute after the Company was compelled to seek a contempt order inasmuch as the Union had refused to obey the state court injunction. In connection with this strike, Respondent, on June 5, 1978, sent a letter to the Union which read as follows:

In connection with the dispute underlying this arbitration, and in view of the unfortunate events transpiring in the last few days, I must set the record straight with respect to several matters. First, it must be emphasized that the Company has always been ready, willing and able to submit the class switching grievance to binding arbitration. When the most recent class switching difficulties developed on Wednesday evening, May 31, 1978, as a result of which several classes were canceled and the unaffected instructors chose to walk off the job, followed by an all-out strike on Thursday, June 1, 1978, the Company made every effort to bring this matter to an expeditious arbitration hearing. Arbitrator Tillem offered both parties Monday morning June 5, Tuesday morning, June 6, Wednesday evening, June 7, and Thursday morning, June 8. The Company expressed total availability for a hearing on any of the suggested dates, but the Union did not. It is only for this reason that the hearing has been delayed until June 15.

Secondly, the Union has chosen to characterize its strike, which has now extended to Friday, June 2, as a "lockout." On Wednesday, May 31, the Company was required to curtail a portion of its operations and to relieve from duty the instructors involved in that portion of its operations. Those instructors, and only those instructors, were required to punch out on Wednesday, but were specifically told to report for work the following day as usual. All other instructors on duty Wednesday evening, and all instructors scheduled for all classes on Thursday and Friday, elected not to report for duty. The Company never instructed those employees not to report, and to the contrary the Union was specifically informed otherwise on Wednesday.

I personally specifically informed you otherwise on numerous occasions over the telephone on Thursday and Friday. When employees refuse to work although they are told to report, it is incomprehensible that you have chosen to call this a "lockout." This is particularly clear when it is recalled that on Thursday morning, the Local President and Vice-President informed Company representatives face-to-face that the men "would not return to work" unless certain concessions were made by the Company. Men who refuse to return to work are not men who are "locked out."

In truth, the Union's actions amount to a blatant violation of the contractual no-strike clause. As I have advised you orally, the Company will not countenance such a blatant contract violation, and, in addition to any other rights it may choose to assert, the Company will hold the New Jersey State Federation of Teachers, its Local Union No. 2322, and all individual officers, agents and members fully accountable for the economic damage incurred by the Company by virtue of this illegal strike.

In October 1978 there was yet another strike, this one over the discharge of an instructor named Whitfield. The strike lasted for 5 days and was settled by the parties on October 13, 1978. At a meeting held between the Company and the Union on that date, Davies, the Company's president, notified the Union that he was "fed up" with the walkouts and job actions and with the Union's failure to follow the grievance procedure and that he would no longer tolerate such walkouts. The evidence indicates that Davies stated that any further actions by the Union would be met with the fullest legal response possible and that he would levy whatever penalties the law permitted. On October 17, 1978, Davies sent a letter to the Union which in pertinent part reads as follows:

In order to avoid any misunderstanding of the remarks I made at the meeting on October 13, 1978, between the Executive Council and the Administration of Lincoln Technical Institute, I am summarizing, herewith, the primary points that were stressed:

1. I cannot and will not tolerate the refusal by the Union and its Members to honor the provisions of the Labor Agreement negotiated between Local Union No. 2322 and the Management of Lincoln Technical Institute. In particular, I refer to the recent incidents of by-passing the grievance procedure and violating the no-strike provision.

2. If the Union, or its Members, disagree[s] with Management's interpretation of the contract, I expect that the grievance procedure outlined in Ar-

ticle VI will be followed, including the provision for binding arbitration, should the matter not be resolved internally. I also expect that there will be total compliance with the no-strike provision contained in Article I, Section 2.

3. Every Union Member is required to comply with the no-strike provision, and failure to comply will result in appropriate disciplinary action. Furthermore, under the law the Union Leadership is held to a higher degree of responsibility. The Leadership is required to make every possible effort to see that the entire Membership complies with the no-strike provision. Failure to comply with this greater responsibility will result in severe disciplinary action against the Union Leadership.

4. In addition to the disciplinary actions set forth above, the Union's breach of the no-strike clause entitles Management to commence legal action for injunctive relief and for money damages, and furthermore permits Management, if necessary, to declare the entire Labor Agreement null and void.

5. Appropriate disciplinary action as a result of the breach of the no-strike clause commencing on Monday, October 9, 1978, is under consideration.

I also wish to strongly reiterate that it should be evident to all concerned that our primary responsibility is to the student. No action should be taken by either the Union or Management that would jeopardize the student's contractual right to get the training he is paying for in accordance with the class schedule specified in the enrollment agreement.

After six years of confrontation between the Union and the Administration, I sincerely hope both parties recognize that, unless, the disputes can be resolved amicably under the provisions of the "Agreement," the continued ability of the school to survive is extremely questionable. Without students neither of us have need of a Labor Agreement.

By way of further background, it is noted that during the summer of 1978 Gerrick went to Philadelphia on behalf of the American Federation of Teachers to assist in the organization of instructors employed by the Company at its Philadelphia school. During that summer the American Federation of Teachers was certified as the bargaining agent for the Philadelphia instructors and Gerrick rendered some assistance to them in connection with proposals for a collective-bargaining agreement. It appears that a collective-bargaining agreement was eventually signed with the Company and the American Federation of Teachers at the Philadelphia location and there is no question but that Respondent was aware of Gerrick's activities in connection with the instructors in Philadelphia. The evidence also establishes that in 1979 Gerrick was a participant in the organization of the secretarial and maintenance employees at the Company's Union, New Jersey, school.

Finally, by way of background, it is noted that in December 1979 the Company retained the services of a consultant to investigate, *inter alia*, the reasons for the lack of an amicable relation between the Union, the instructors, and the Company. In this regard, the evidence indicates that Gerrick, as president of the Local Union and its Executive Council, opposed the consultant's plan to interview, on an individual basis, the instructors, and that as a result the Company agreed not to bring in the consultant for a 30-day period so as to see whether the relationship between the parties improved during that period of time.

IV. THE ALLEGED UNFAIR LABOR PRACTICES

A. *Introduction and Contentions of the Parties*

The key to the General Counsel's case is the assertion that Respondent, and Alfieri in particular, devised a plan or conspiracy pursuant to which the Company would find a pretext to fire or suspend Gerrick, which, based on the Company's past experience with mid-term strikes, would predictably lead to a strike prohibited by the no-strike clause of the collective-bargaining agreement. It therefore is asserted that, based on this plan and the predictable response of the instructors, Respondent intended to discharge all of its unionized instructors at the Union school, rescind the collective-bargaining agreement, and withdraw recognition from the Union. This elaborate theory is indeed somewhat necessary to the General Counsel's case as he concedes that on February 11, 1980, Gerrick, Wigder, and O'Neil did engage in conduct in violaton of the Company's rules and regulations and thereby received suspensions. The General Counsel also concedes that with few exceptions the employees in the bargaining unit did engage in a strike on February 13 during the term of the contract.

Respondent contends that the suspensions of Gerrick, Wigder, and O'Neil were lawful as they were based on their admitted breach of the Company's rules and regulations. Respondent further contends that there was never any plan or conspiracy as alleged by the General Counsel and that, when the instructors engaged in the strike, they were engaged in unprotected activity.

B. *Events Prior to February 11, 1980*

To establish longstanding animus by Respondent toward the Union, the General Counsel called Daniel Gommel, an instructor and alternate shop steward, to testify. He testified that he had a conversation with Alfieri during the summer of 1978. Gommel stated that the Union had objected to Gommel's proposed transfer to the Philadelphia school and that the conversation began as he informed Alfieri that he would not accept the transfer. He testified as follows:

> A. Mr. Alfieri said at that point that it would be [in] my best interests to be in Philadelphia because there was going to be a continuing lot of problems here at the school, between the union, such as we were having right now—the union objecting to me to come, to go to Philadelphia, et cetera. That's where the conversation turned towards the Union, at that point.
>
> Yes, I agreed. I was annoyed with what the union—the union had done something—I wanted to

go, the union said no. At that point, I said Mr. Alfieri can we go out into the auditorium to talk. I did not feel comfortable in his office. We went to the auditorium and we discussed it. Mr. Alfieri asked me who is it specifically on the executive council that objected? Was it the entire executive council? And I tried to explain to Mr. Alfieri that it was one man who had opposed this, not an executive officer, and that the executive council just said hey, we don't need the hassle. . . .

That type of thing.

We further discussed the union, the continuing ongoing conflicts of it and Mr. Alfieri suggested my getting involved in the union, and I thought yes, I should get involved in the union. And then a bit of flattery that I was an intelligent type of person and in a position of presidency and to that effect, that probably this would be a much smoother type of operation running, and so forth and so on. That was about the total amount of conversation Mr. Alfieri and I had. I went back to my regular assigned classes. Shortly thereafter I was appointed alternate steward and started looking into, as much as possible, more of the union, trying to learn a little bit about it.

Q. Before you go ahead with this, you had mentioned earlier that he said it would be in your best interest to transfer to Philadelphia—

A. This was in his office. He suggested that—

Q. Did he say why it would be in your best interest?

A. I think it would be to understand that he knew why I was not a person that . . . enjoyed a lot of friction. Let me do my job, let your people do your job or whoever, and let it be alone. This constant upheaval and so forth had always upset me and he knew this, I knew this. He suggested that I permanently transfer to Philadelphia. It would be in my best interest because certain this was going to get far worse. There would be more blow-ups in the future and more problems, and if I went to Philadelphia I wouldn't see this. I would not be exposed to this.

According to Gerrick, in the summer of 1979 he had a conversation with Pat Santangelo, who was then Respondent's Controller.[2] It is during this conversation that the General Counsel alleges that the "plan" came to light. Gerrick testified as follows:

> A. Well, I went up to the corporate office and Pat says, let's go to lunch, and we were going to go to lunch at the Rusty Door or Rusty something. . . . We started the discussion, you know, while walking to the restaurant; okay? And all through lunch. The tone of the meeting was that there was a relatively bad attitude, bad feeling in the school, okay, between the management and union, and we would like to see this come down.

JUDGE GREEN: Is that what Mr. Santangelo said or what you said?

THE WITNESS: All right; you want, like, quotes from both sides. That was the general mood of the meeting; all right?

MR. GRANT: Answer his question.

THE WITNESS: Nobody said that exactly, *per se.*

JUDGE GREEN: I understand, but the meeting was called by whom?

THE WITNESS: Pat Santangelo.

JUDGE GREEN: All right; then did he tell you what—you know, when you got into this did he indicate to you in words or substance, what it was that he really wanted to meet with you about, what his concern was?

THE WITNESS: Yes; in other words, it was a long, lengthy meeting. In other words, we met from about 12:30 till around—12:00, somewheres like that, till around four or later in the evening, so it was a rather lengthy discussion.

Now, you know, we went at particulars. In other words, we both went at particulars. I, of course, blamed management for all the problems, or specific managers.

Pat turned around and said, well, look, you're union members. And in most instances we did agree. In other words, I said, yes, this particular guy is wrong; yes, he agreed that sometimes this is wrong.

And, you know, we were coming into an understanding about the actual hardships. We also went into problems with scheduling. In other words, it was scheduling of the classes. We went into hours, afternoon classes, overlaps, the night classes. It was a very lengthy meeting.

Then on the way back to—actually when we got back, when we returned to the corporate office I said to Mr. Santangelo, I says, that one of the biggest bones of contentions I have is that either me personally or the union personally or Mr. Alfieri, have a very rough time getting along because Mr. Alfieri is a very strong person. So Pat went in and said that, yes, Mr. Alfieri is a very strong person. He's strong even in the meetings up there on the corporate hill, where they meet with the directors. Mr. Alfieri is always—always tries to show other directors how to run their schools so we talked in that vein.

Mr. Santangelo said that Mr. Alfieri is in very high regard with Mr. Davies and Mr. Alfieri is going to remain at Lincoln Tech forever and—well, not forever, but remain at Lincoln Tech, and, again, we—I tried to emphasize the problem we have with a very strong personality against the union. It seemed like every—in other words, no matter what we did we were getting really dumped on.

In this conversation Pat also mentioned a thing that Mr. Alfieri had evidently mentioned up at corporate hill, where Mr. Alfieri mentioned that—evidently that the union was very strong and he had, more or less, a theory that what he should do is go

[2] Currently, Santangelo is an executive vice president of the Company. At the time of this conversation, he was higher in the corporate heirarchy than Alfieri.

out and fire or suspend me and since the guys or the members are very loyal, if I was fired or suspended, the guys would walk out and then he would turn around and fire everybody; okay? And, therefore, get rid of the union.

* * * * *

Q. Where did you go after you left? . . . what time did you wrap up?

A. Around four, four, 4:30.

Q. Where did you go after you left there?

A. Back to school.

Q. Did you meet with anyone back at school?

A. Yes; some members of my executive council, who I related the discussion I had with Mr. Santangelo; I related to members of the executive council. Not all the members of the executive council. Just some, because some of the members weren't there. But I met with them later, the following day.

Q. You met with the executive council the next day?

A. Not in mass. I didn't have a meeting. In other words, what I had was—when I returned from West Orange to the school there was only certain members of the executive council there. I went and discussed my conversation with Mr. Santangelo with those members, the present members, and then the following day I discussed it with the members, that work day. I didn't have, *per se*, an executive council overall meeting.

Q. Okay.

At another point in his testimony, Gerrick stated that during his conversation with Santangelo the following exchange occurred:

> A. We were talking about many things like Pat says to me, I'll bet you think my managers sit up on weekends thinking of ways to—screw you? And I says, you're right. I says—I swore to Pat, I says, yes, I do believe that's what actually takes place. And he said believe me, that's not what goes down.

Regarding the conversation between Gerrick and Santangelo, the latter asserts that he did meet with Gerrick to work out a change to a 4-day week and that an agreement was reached on that subject. Santangelo denied, however, that he either told Gerrick of a plan to get rid of him or the Union or that Alfieri had ever told him of such a plan. Alfieri also denied the existence of such a plan. To the extent that Gerrick's relationship with Alfieri was discussed, Santangelo testified:

> Q. Was there any other topic of conversation during lunch?
>
> A. Yes.
>
> Q. And what was that topic?
>
> A. About Mr. Alfieri.
>
> Q. Okay, who raised the subject of Mr. Alfieri?
>
> A. Mr. Gerrick.
>
> Q. What did he say?
>
> A. That he found Mr. Alfieri to be—to have a very strong personality and tough to live with.
>
> Q. Did he state any thing else?
>
> A. That's pretty much what I recall.
>
> Q. Did he say anything else about his personality?
>
> A. Well, that he did have a strong personality also that at times it created a clash.
>
> Q. Did you respond?
>
> A. Well, I agreed that . . . Mr. Alfieri had a very strong personality, but the corporate personnel generally found him to be very fair and conscientious, especially toward instructors. And also that it appeared to me that they were having a communications problem and what I recommended was to have more frequent meetings between Mr. Gerrick and Mr. Alfieri.

As noted above, Gerrick testified that, immediately after his conversation with Santangelo, he informed the various members of the Union's Executive Council of the conversation. In this regard, Jack Schuster testified that, when Gerrick reported his conversation with Santangelo, "there was some wording that came through to me that Mr. Alfieri had a desire to . . . get rid of Mr. Gerrick, and therefore the Union subsequently. How far that went, I don't know." Fred Kretzmer, a shop steward and a member of the Executive Council, testified that at a meeting of the Executive Council held on February 12 or 13, 1980 (after Gerrick had been suspended), "Mr. Gerrick mentioned something about a plan Mr. Alfieri had of firing him and then firing everybody else when everybody walked out." Daniel Gommel also testified that Gerrick told him of his conversation with Santangelo. He testified:

> A. He said something to the effect that Pat had indicated to him that Mr. Alfieri's . . . main purposes was to break up the Union.
>
> Q. Did he say [it] in any specific way?
>
> A. No, No.
>
> Q. That is to say, did Mr. Gerrick say that—
>
> A. Yes, wait a minute—said break up the Union, get rid of the Union. I'm sorry. It was not break up, it was get rid of the Union.
>
> And there was a lot of other things he told me that—
>
> He did tell me that Mr. Santangelo told him that—to try to just, you know, work it out as best he could . . . . Be patient, and essentially that if he had any problems at all with Mr. Alfieri, here was a number that you could reach me at any time.
>
> * * * * *
>
> Q. All right. You're already told us that Gerrick said that Santangelo said that Alfieri said he wanted to get rid of the Union?
>
> A. Yes, I mean it was like—
>
> Q. All right, well, many times removed?
>
> A. Many times.
>
> Q. All right did Mr. Gerrick tell you how?

A. No.

Q. It was going to be done?

A. No, he didn't even know, I don't think.

Q. All right, but he did not tell you how Mr. Alfieri proposed to accomplish that result?

A. No. Mr. Gerrick had said many times that—you know, he had suspected this and believed it for whatever reasons, and so forth, but never—never had any clear inkling or idea, never.

Q. As to how it was going to happen?

A. How it was going to happen.

Q. Or what the scenario might be?

A. No.

Q. And you're sure he did not present to you or tell you about any particular scenario or plan?

That is to say, Mr. Gerrick?

A. He talked a lot to me and I know he mentioned many times suspicions he had—as you call them, maybe scenarios. But you know, there was a lot of those. You know, he suspected they may be coming from this direction or that direction or something like that.

* * * * *

Q. All right, but he's telling you—Mr. Gerrick is telling you, "I spoke to Mr. Santangelo and Mr. Santangelo tells me that Alfieri wants to get rid of the Union," right? This is not an everyday occurrence he's telling you about. I mean, this is from the horse's mouth, so to speak?

A. Yes, but we all knew this. I mean this was a general view we had anyway, so it didn't surprise any of us.

Q. All right, but your testimony also is that, when Mr. Gerrick told you about this conversation he had with Mr. Santangelo, he did not say how it was going to be done?

A. He said something—and I don't know—I have to say no, I do not remember. But he did indicate something else or something that was in the works or cooking, but it wasn't anything to do with whatever happened here, or I would have remembered that.

Regarding the above, O'Neil, a union officer and a member of the Executive Council, testified that in July 1979 when Gerrick reported this conversation with Santangelo: "[W]hat I recall, Mr. Gerrick had mentioned that he had just come back from . . . speaking with Mr. Santangelo and Mr. Santangelo had mentioned to him that Mr. Alfieri was going to get Mr. Gerrick and the Union." When asked if he could remember any more details about the conversation, O'Neil said, "No." He also testified that Gerrick did not relate that Santangelo told him how Alfieri was going to accomplish that result. On the other hand, Ronald Muller, who also was on the Executive Council in the summer of 1979, testified that Gerrick told the members of the Executive Council at that time "of a proposal to fire Gerrick and the rest would follow—in other words, we would follow—if they—the rest of us would be fired."

I note here that, despite the fact that Gerrick asserts that Pat Santangelo had told him of Alfieri's plan to suspend or fire Gerrick and then get rid of the Union when the rest of the instructors went on strike, and despite the testimony of Kretzmer that Gerrick mentioned this plan on Tuesday, February 12, the day after Gerrick had been suspended, the evidence reveals that at no time during any of the meetings between Gerrick and/or the other union officials held with management on February 11, 12, and 13, 1980, did anyone from the Union accuse the Company of carrying out the "plan" or otherwise incicate that they were aware of such a plan.

In a related manner, Gommel testified that he had a conversation with James Connolly, Respondent's training officer, at the Union school in the summer or fall of 1979. Gommel testified that, in his capacity as an alternate shop steward, he spoke to Connolly to resolve a small problem which was quickly accomplished. Gommel continued his testimony as follows:

A. . . . I said what the hell is going on between the union and management? Why can't we people live? Get along and not have friction—you know—

I says look, we came in here. We had this little issue, two words, it was settled, it was done, it was all over.

* * * * *

You know, what's going on? Why can't this—why do we always have these problems—at the school three years and all this little bit of aggravation—squeezing up, tightening down—loosening up, tightening down, different actions and so forth.

Mr. Connolly said to me, well, that's just the way it is with the contract. We cannot live with that contract.

I said well, you signed it. We can live with it. You can live with it, and we got into a discussion on management abilities to basically handle union affairs.

Q. Now, again. Try not [to] summarize it. Tell us what you said?

A. Okay. I said to Mr. Connolly, I said, my God, your people are management people. I know you're going to school, taking a course in business administration for your undergraduate degree. This is part of management—learning how to deal with union problems and not having—saying they can't be dealt with. And we went back and forth on this subject. Academic learning against what was happening in our school and Mr. Connolly basically said—said that when it comes to management and to running a place like the school, you take your academic and you literally throw it out the window. It doesn't operate that way, except in the financial aspects of it, and so forth.

I said, not even in the management of the people, union relations and so forth? No. And I couldn't understand this.

And he squarely turned around and pointed to the office next door to him, which was Mr. Alfieri's

office and said that man in there calls the shots and he is on his crusade—and this is a quote—and he said, that's it.

And that is direct—that's—

Q. What else did he say about operating under the contract, if anything?

A. Well, that it was impossible. It was impossible to operate, there were teachers in the school that were inefficient, not producing correctly, et cetera—you know, bad teachers.

And I said to him, Mr. Connolly, in your contract you have a provision for eliminating these teachers. Step by step evaluation, and also requiring remedial measures to be given to an instructor to help upgrade him, and if all this doesn't work, you can get rid of him. You know, if he's no good, you can get rid of him.

Oh, no, that doesn't work. That doesn't work. Why doesn't it work? We just don't use it.

Now, at one time there was an instructor they had some problems with—yes, a lot of the management people did work with him to help him straighten out in the classroom and so forth.

But the process, the step by step process of evaluating the instructor, bringing him in, helping him and so forth, which was a method of eliminating the bad instructor, was never in practice. And I was told it just doesn't work so we don't use it.

Q. Did he say anything about personalities in his conversation?

A. Yes, he did.

Q. What did he say about personalities?

A. He said you have . . . locked personalities between Mr. Alfieri and Teddy—the two of them are around. He said, you know, it's going to be locked horns and two bulls butting their heads against each other.

And his closing remark in that conversation was, look, I just work here. I just do what I'm told.

Gommel also testified to another conversation he had in a similar vein with Henry Puzio, Respondent's assistant director of the Union school, sometime in the Fall of 1979. Gommel explained that this conversation started with a discussion of lesson plans, and, like the conversation with Connolly, evolved into a general discussion about company-union relations. Gommel testified:

> A. In that conversation Mr. Puzio told me that Mr. Alfieri was out against the union and it was always going to be this way, until he finally got to the point where he had the upper hand with the union and he could control it.
>
> I'm going to use the word control. That is not Mr. Puzio's word. Words used that would imply on hands, on top of the situation, of keeping the union under his hands, under his control. Again, the word control misleads and I don't like that word.
>
> JUDGE GREEN: Well, the reason you don't like that word is because it would imply that Mr. Alfieri intended to run the union himself?
>
> THE WITNESS: Yes, that's why I don't want that word used, but I can't think of a better word.

More domination over the union—something in that type of word, without using the word control.

JUDGE GREEN: All right, it wasn't implied that Mr. Alfieri was going to run the union?

THE WITNESS: No, he wasn't running for president of the union at all or anything like that. That he could control the union—

JUDGE GREEN: It was more in the sense of in terms of confrontation between the union and the company, Mr. Alfieri intended to win?

THE WITNESS: Right. At all costs at all times.

JUDGE GREEN: Well, did he use those words?

THE WITNESS: Yes.

THE WITNESS: It was a dedicated out and out thing and that's just the way—he said to me, Dan, that's just the way it's going to be. It's not going to be any different.

Q. (by Mr. Grant) Do you recall anything else? Now again you're reconstructing the conversation to the best of your ability and continue to reconstruct it until you've exhausted your recollection about this?

A. That is—I think that is about all I have—of the items I have to actually say.

Q. Did he say anything about the purpose of Mr. Alfieri being there, if you can recall?

MR. GLICKMAN: I object. First of all, it's a vague question. Second of all, tremendously leading.

* * * * *

Q. All right, do you remember anything else in the conversation? Other than what you've already testified to?

THE WITNESS: What I've already told you is as accurately as I can remember the conversations. The only thing I could add is the general impressions that were left with me from these conversations.

* * * * *

Q. (By Mr. Grant) You can't testify to what went on in your mind as to what he said, but can you testify to what—you know, as close as you can to what his words and before I go any further, can you remember anything, not in exact words, but the thrust of what he said, the purpose—

A. Okay. The thrust of the conversation with Mr. Puzio was that this was confrontation and dedication, on actually Mr. Alfieri's side, who was going to go through with—you know, he was going to—straight down the line as far as he could go.

And also that Mr. Gerrick—was it Mr. Gerrick—position of having to defend the union and that was just confrontation time and it was going to be [a] locked horn situation. Mr. Alfieri would not budge. There would be no yielding and he was going to fulfill his purpose.

And that was to break this thing up, be able to manage it, and he was not going to rest until that was finished.

JUDGE GREEN: All right. Now we're starting to get into perhaps a degree of semantic distinctions. Break this up and manage it are two completely different things.

THE WITNESS: Break up the existing structure of the union, being able to restructure it and then manage it.

This is a conversation that was carried on over maybe a period of an hour and a half.

Judge Green: I know, but it's obviously important.

THE WITNESS: Yes.

JUDGE GREEN: And I wasn't there, so it's important for me, at least, to get as accurately as possible what took place in that room.

Well, all right. Go ahead.

Q. (By Mr. Grant) Let's address what the Judge pointed out. Busting it up is different from managing it.

Can you be any more specific about what terms he used?

Now I realize, Mr. Gommel, it's very hard. It's a year ago—

A. And it wasn't something I had put away in the back of my memory and never really recalled and never thought it too much importance. May I have one moment?

JUDGE GREEN: Sure.

Mr. Grant: Sure.

A. (Pause) No, I'm sorry. I really can't add too much more to that. I really can't. Essentially what I said—words were used. The words that I used, breaking up, managing.

Q. Breaking up what?

A. The structure of the union as it existed. It's executive council. That was part of the discussion. Those words were used. In what exact sequence, in what exact timing and so forth, I can't recall.

Regarding Gommel's testimony, Connelly denied having any such conversation along these lines. As to Puzio, he testified that he had several conversations with Gommel about lesson plans which evolved into discussions of the Union. He testified that Gommel had stated that he could not understand why the Union and the Company could not get along and that he (Puzio) acknowledged the problem, stating his opinion that it was "primarily an attitude problem." Puzio further testified that the only time that Alfieri was mentioned was on an occasion when Gommel said that "he felt . . . that the problem was Mr. Alfieri couldn't get along with Ted Gerrick and as a result of the two, everybody else was paying the penalties of the trivial staff that was going on." Puzio stated that he told Gommel that he could not see how the personalities of these two individuals were going to affect the rest of the people at the school.

The General Counsel also presented another witness, David Heidenthaler, an instructor,[3] to testify about a conversation prior to February 11, 1980. Before relating the conversation in question, Heidenthaler testified that during his employment at Respondent he reached the opinion that Respondent's management was failing to run the school and was extremely reluctant to take any steps to impose proper discipline on the employees. He stated that he expressed this opinion to Paul Hilco, the head of the automotive department, who essentially threw up his hands and said, "Well what can you do?" As to the conversation in question, Heidenthaler testified that sometime in January 1980 he volunteered to take over a class from an instructor who was absent. He stated that he spoke with Connolly, who said that Heidenthaler could not take over the class because "the contract won't let you." Heidenthaler stated that at this point Alfieri walked in. He testified that he told Alfieri that, "as far as I'm concerned, you can take the contract and stick it, I've been in trouble with the Union before, I've been in trouble with you before . . . . If the contract worries you, it won't present a problem. I'll go down to Labriola[4] and I'll go down to Teddy[5] myself. I'll ask him myself, does that satisfy you. I'll take care of it; it won't present a problem." Heidenthaler testified that Alfieri responded by saying, "[D]amn right, it won't shortly."

C. *The Events of February 11–15, 1980*

Preliminary to a discussion of the events on these days, it is necessary to discuss Respondent's policy with respect to what is called noninstructional time and floating time.

The evidence discloses that noninstructional time is essentially the afternoon period between the morning and evening classes when instructors who are scheduled to teach are expected to do research, make lesson plans, correct papers, or do other types of activities related to their jobs. The instructors are paid for this time and the Company's policy has been, at all times relevant herein, that an instructor may not leave the premises without permission when he is on noninstructional time.

Floating time refers to situations where certain instructors are assigned to be available to cover classes in the event that the normally assigned instructor is absent, or otherwise to lend assistance in the classroom when necessary. Unlike noninstructional time, floating time occurs when classes are in session. However, floating time is similar to noninstructional time in that, if the "floater" is not needed to cover a class, he is expected to prepare lesson plans, etc., and he gets paid for the time in question. Permission is necessary to leave the premises during floating time.

It is agreed that the Company maintains a set of rules and regulations governing the conduct of its instructional staff. These rules are divided into major and minor rules. Breaches of minor rules do not result in dismissal but subject an employee to discharge for continued breaches. Violations of the major rules do carry the possibility of summary dismissal. The rules relevant to this case are as follows:

[3] Prior to being employed by Respondent in March or May 1979, Heidenthaler was employed in a supervisory capacity by Hertz.

[4] A shop steward.

[5] Referring to Gerrick.

Minor Rule 1. Failure to notify the supervisor in advance that he/she will be late or absent, except in cases of extreme emergency.

* * * * *

Minor Rule 10. Abuse of time during assigned working hours.

* * * * *

Major Rule 7. Neglecting his/her job duties or responsibilities or refusing to perform work assigned to him/her.

Major Rule 8. Leaving school premises during assigned working hours without first receiving proper authorization and/or dismissal of class or allowing student to depart school before approved termination time without proper permission from appropriate supervisor.

Major Rule 9. Possession of, or drinking of, or under the influence of any alcoholic beverage on school premises for the purpose of using or dispensing same to others.

In connection with the enforcement of the rules relating to leaving the Company's premises during working hours without permission, the record is replete with instances of warnings, dockings of pay, and suspensions. It seems that the Company's normal response when discovering an instructor off the premises without permission during noninstructional time is to reprimand and/or dock the individual for the time away. It also is established that in certain cases where individuals have been reprimanded they have also been warned that any reoccurrence would result in serious disciplinary action, including possible discharge.

In relation to the enforcement of the above-described policy, Respondent introduced into evidence a series of records from about November 1975. As noted above, most discovered instances of instructors leaving the premises during noninstructional time resulted either in warnings, dockings of pay, or both. The records also disclose three instances of suspensions. One involved a 3-day suspension on May 24, 1977, of Gerrick for refusing to take a class when he was on duty as a floating instructor. Another involved a 5-day suspension of an instructor for leaving his post early and for giving a false excuse for an absence. In this instance, which occurred in June 1976, the Union interceded on the employee's behalf and succeeded in having the suspension reduced to a written reprimand with a docking of pay. The third instance, occurring in August 1978, involved a suspension of another instructor who was off the premises during noninstructional time and arrived an hour late for class. In this instance, the Union again interceded on the employee's behalf and the Company offered to reduce the suspension from 3 to 2 days. The offer, however, was rejected by the employee and the 3-day suspension was carried out.

The Company's records also show a situation where an instructor was discharged for repeated violations of this character. On May 4, 1978, the instructor in question was fired because of his failure to notify the school of his absence and because of prior instances, in 1978, when he had left the premises without permission. In this instance, the Company reduced the discharge to a 14-day suspension after discussions with the Union. Thereafter, on November 27, 1978, this individual was again discharged, the precipitating cause being his failure to report his absence from work on November 22 and 27, 1978.

It is noted that the Company's records do not indicate any instance when an instructor was given disciplinary action solely because he left the premises during floating time without permission. However, these records do not show that the Company ever caught an instructor who violated the rule while on floating time, and the record as a whole is unconvincing that prior to February 11, 1980, the Company did in fact catch instructors off the premises without permission during floating time. It is additionally noted that both Gerrick and O'Neil had received a number of warnings and dockings of pay prior to February 11, 1980, for being off the Company's premises without permission during noninstructional time. The evidence does indicate, however, that Wigder was never the recipient of such disciplinary action.

On the evening of February 11, 1980, Gerrick, O'Neil, and Wigder were assigned as floaters for the evening classes along with four other instructors. It is undisputed that at or about 7 p.m., after the evening classes had begun and were covered by the necessary instructors, Gerrick, O'Neil, and Wigder decided to leave the premises to get gas and have dinner at a restaurant frequented by many of the instructors. It also is undisputed that they did not seek or obtain permission to leave. In this regard, O'Neil, who had previously received warnings and dockings of pay for being off the premises without permission during noninstructional time, testified that he was aware when they left that they risked the possibility of being suspended if they were caught.

When the three instructors got to the restaurant they went to the bar section and ordered food. Gerrick and O'Neil ordered beers, whereas Wigder ordered a ginger ale because he does not drink. While waiting for their food, but having received their drinks, Alfieri, Connolly, and Puzio entered the bar. The three instructors were then ordered by Alfieri to return to the school and they left without eating. Upon their arrival back at the school, Gerrick and Alfieri met in the latter's office. Wigder, upon his return, was asked to help another instructor in an auto transmission class, which he did.

It should be stated at this point that the appearances at the restaurant of Alfieri, Connolly, and Puzio was not fortuitous. It was their testimony that earlier on that day they had planned to visit the local drinking establishment because they had earlier received reports from various unidentified students that unidentified instructors were teaching classes while under the influence of alcohol. In any event, it is clear that their appearance at the restaurant was deliberate as a means to catch instructors in violation of the school's rules.

Gerrick's testimony regarding his initial meeting with Alfieri on the evening of February 11, 1980, was as follows:

A. The first thing Mr. Alfieri says, you know, what were you doing in there. I believe, in other words. What were you doing in there? I says, well, we went in there to eat and I believe I told Mr. Alfieri I was talking to Danny about something. I don't remember if I told Mr. Alfieri that, but I know I said we went in there to eat.

And Mr. Alfieri says, this is a very serious matter. And I says, you know, I says, I know we were wrong and we should have asked permission, but I can't see, okay, the severity of the matter, because I know people who are off [the] premises without permission and they got various forms of—whatever you call it—reprimands, from nothing, no letters of warning at all, to a docking in pay and probably the highest would have been, you know, suspension.

I says, I can't see the severity of this matter at all.

And we stayed with that for a little while.

* * * * *

At one point in the conversation Mr. Alfieri—yes, I know—Mr. Alfieri says—I believe he says, I don't know what to do; again, it's a very serious matter. He says, if—something like—in other words, if you weren't union president, or because you're union president, something like that—I don't know what he meant by that, but at that point I started getting a little angry. I—Mr. Alfieri says, do you have anything more to say? Or do you have any further explanation? I says, I don't think there's anything more to say. At that point somewhere around that point Mr. Alfieri called in the other two men. Mr. O'Neil was rather upset.

After the private conversation between Gerrick and Alfieri, the other two instructors, O'Neil and Wigder, were called into the office along with Puzio and Connolly. During this conversation, the three individuals were told by Alfieri that they were suspended pending the return of Davies (Respondent's president), who would make the final determination as to the extent of the discipline. It is established that Gerrick protested the indefinite nature of the suspensions and that, in response, Afieri stated that the suspensions were not indefinite, but rather were temporary pending Davies' return. It also is clear that Alfieri was asked if the three could be discharged and that his response to this question was that it was a possibility. There is a dispute as to whether Alfieri told the instructors that Davies was scheduled to return on Thursday, February 14, 1980,[6] but some of the General Counsel's witnesses acknowledged that Alfieri did say that Davies would be returning in 2 or 3 days. There is also a dispute as to whether Gerrick and O'Neil appeared to be drunk, and the three witnesses for Respondent asserted that from their observation Gerrick and O'Neil did appear to be under the influence of alcohol. They conceded, however, that Wigder appeared to be sober. O'Neil and Gerrick denied that they were drunk, although it is conceded by Gerrick that O'Neil became very agitated at the meeting[7] and that he was told by Gerrick to be quiet. The bartender who was at the restaurant on the evening of February 11, 1980, testified that he only served beer to Gerrick and O'Neil and that, in his opinion, none of the men were drunk.

As to the actions taken by Respondent against the three instructors on February 11, 1980, the testimony from both sides does not establish that Gerrick, O'Neil, and Wigder were indefinitely suspended pending discharge, as alleged in the complaint. On the contrary, the evidence establishes that the three were notified that they were temporarily suspended, that there was a possibility of discharge, and that a final disposition of the ultimate disciplinary action would be made in a few days when Davies returned. Indeed, the evidence indicates to me that Alfieri was anxious not to make a final decision on the discipline and was seeking to defer that matter to his superiors. Also on that evening, Alfieri reported these events to Santangelo, who in turn reported them to Davies. According to Santangelo, Davies did not want to make any final decision until he had a chance to be briefed on the entire matter when he returned.

On the morning of February 12, 1980, at or about 7 a.m., a meeting was held between the Company and the Union regarding the three suspensions. Also attending the meeting were Gerrick, O'Neil, and Wigder. Appearing for the Company were Alfieri, Puzio, and Connolly. Inasmuch as Gerrick had been suspended, Jack Schuster became the Union's acting president and he was the Union's spokesman at this meeting. As to Schuster's testimony, except for his description of the tone or demeanor of the people involved, there is no significant dispute as to his description of the meeting's substance. Schuster testified as follows:

A. I said why are these people suspended indefinitely and with the possibility of termination over something which is—appears to me to be relatively minor. I've never expected such a thing. I was rather shocked.

He would not discuss it. He said there will—you know, I will not discuss it further. Mr. Davies is going to deal with this when he returns.

And I said well, why Mr. Davies? Discipline of this type is usually handled by the department head, not even going to the director's level.

He said, well, this is the way it's going to be; and I said, well, where is he? When can we talk to him? When can he deal with this?

And I was just told he's out of town and he'll be back in a few days.

Well, we're talking about a few days—this was Monday night—I'm sorry, Tuesday morning. So a few days. That was all, you know. And I pressed the issue and I said look, temporarily reinstate these people. We agree that they broke the rules. We

[6] Davies was in Indianapolis making some radio appearances.

[7] O'Neil apparently was upset because, among other reasons, his shop steward was not allowed to be present. The General Counsel does not allege this to be a violation of his *Weingarten* rights. (*N.L.R.B.* v. *J. Weingarten, Inc.*, 420 U.S. 251 (1975).)

agree that they're subject to discipline. But put them in their classes, cover the classes. Let the membership see that things are going to be worked out and we'll take the discipline. Many times people have been suspended a few days after they committed some infraction. It doesn't have to take place, bang, at that instant.

Q. What did he say?

A. . . . He said no, they're out and that's it and they're going to stay out until Mr. Davies deals with it, and that's final.

So I was unable to get him to agree to—to discuss anything and at that point, he was more adamant than I've ever seen him as far as my dealings with him, because my past dealings with him have been much more relatively calm. And of course, I have a reputation for not blowing my top. I have a long fuse and I don't do it and I was—I got the feeling I was being pushed and I didn't—

I was being stonewalled—I don't know what the right term is, but I just had a feeling of frustration at that point.

Q. Can you describe what tone of voice he used? How he carried himself during this meeting?

A. Well, at that point, on Tuesday morning, the first time it was an attitude of look, this is the way it's going to be. And I said how about the fact that you didn't call the shop stewards in and you didn't handle the discipline in the normal manner? I said the contract calls for some procedures in that. He said so grieve it. Well, I didn't want to hear that, but that's what I heard.

Q. Was anything said about a writing at that time?

A. Give me that again? I'm sorry.

Q. Written charges?

A. Oh, well, that came—that followed, of course, with the discussion—I pointed out that the normal procedure in the past had been to present charges in writing to the man, with the shop steward, so that the whole thing could be clear, and so forth.

* * * * *

A. I said here it is Tuesday morning. The men are out. The membership are mad. They're mad at me because I'm not getting answers. They're mad at the whole situation. And I said we still don't have letters of suspension.

And he said, well, you'll get them when they're ready.

Q. I want to make sure of this. Had anyone that you know of every been suspended without a letter?

A. No, not to my recollection. No.

Q. What did you do after this meeting? Oh, by the way, how did you end the meeting?

A. Well, we ended the meeting with a feeling of frustration with the inability to get any concession or any information as to what the final decision would be, as I said. And I went back to the people and we went to work, we went to class, at 7:30. Or probably a few minutes after. Because we certainly didn't want to disrupt the classes. I told the membership to go to class and cool it, and of course, I was getting a lot of heat from a lot of people by then.

After the meeting between the Union and the Company that morning, Alfieri was asked for and gave permission to merge the breaktimes of the automotive and refrigeration instructors so that a union meeting could be held from 10 to 10:20 a.m. At this meeting the instructors were told by Schuster what was going on and, as a group, they were extremely upset. When the meeting extended beyond the 20 minutes allotted, Alfieri asked the instructors to return to their classes. He did, however, grant a request for an additional 5 minutes, but when that time elapsed he again entered the meeting and told the instructors to go back to their classes, which they did. According to the testimony of Donald Muller and Charles Howard, Alfieri said that they should either go back to class or leave the building. According to Schuster, the instructors at this point were ready to strike, but decided to go back to classes at this time.

Heidenthaler testified that he did not go to the union meeting on February 12, but rather went to Hilco's office where he engaged in a conversation with Hilco, Puzio, and Alfieri. His testimony, which was denied by Respondent's witnesses, was as follows:

> A. Well, Mr. Puzio asked me what was going on. I guess he referred to the meeting.
>
> I told him he knew as much as I knew. I wasn't there; I didn't want to be there.
>
> I told him the same thing I told Paul. They were upset; they don't like what happened. "You handled it wrong."
>
> And Puzio spoke to me for a while and some of it, he said, "This time we're right; we hold all the cards; and if they don't realize it they're going to find out the hard way."
>
> And I just looked at him for a minute and I said, "You know, you keep that up, you're going to have a walkout, because they're hot."
>
> And he said, "Well, if—a couple of weeks in the street may help them straighten this matter out. We want that."
>
> I said, "Well, it's your choice."
>
> And I didn't take for granted what he said, but Mr. Alfieri popped up and said, "[I]f they walk out, I'm going to throw the book at them and take care of the whole bunch at one time."

Also on the morning of February 12, the suspension letters were prepared and delivered. Identical letters were given to Gerrick, O'Neil, and Wigder. They read:

> Pursuant to our meeting on the evening of February 11, 1980, regarding your violation of established Company Rules and Regulations; Minor Rules number One (1) and Ten (10), and Major Rules number Seven (7), Eight (8), and Nine (9), please be advised that your suspension from work, without

pay, is hereby confirmed effective 8:00 p.m. February 11, 1980, until further notice.

You will be advised of final disposition, upon full investigation and review of this matter.

On the afternoon of February 12, a meeting of the Union's Executive Council was held at a restaurant, and was attended by John Fallon, a representative of the American Federation of Teachers. According to Muller there was a discussion of the avenues of relief that the Union might seek in connection with the suspensions. Muller testified that they explored the possibility of utilizing the contract's grievance procedures and also explored the possibility of a strike. He stated that Fallon laid out the options without making any specific recommendation and left the ultimate course of action up to the local Union through a vote.[8] Fallon did not, however, tell these people of the potential adverse consequences of a strike in breach of the contract's no-strike clause. According to Muller, the people present felt that if a strike were called the Company would respond by going to court and obtaining an injunction, as had happened in the past.

Later in the afternoon of February 12, Schuster spoke on the phone with Santangelo. Schuster asked Santangelo to allow the three suspended instructors to return to their classes and said that he did not know if he could keep the instructors from walking out. According to Schuster, Santangelo responded by saying, "[W]e can close the building for a year" and that he would prefer to let matters take their course. Santangelo testified that when Schuster told him of a possible strike he replied that the instructors should be aware of their "possible consequences of losing their jobs."

On Wednesday morning, February 13, the Union's Executive Council again met with Alfieri but were unable to persuade him to reinstate Gerrick, O'Neil, and Wigder. At this time, Alfieri reiterated the final decision that the Union could grieve the suspensions if it was not satisfied. Alfieri testified that at the end of this meeting he told Schuster not to do anything rash, that Davies was returning within 24 hours, and that the Union had held a general membership meeting in the instructors' lounge where a strike vote had been taken and carried. As to the vote itself, it appears that it had carried by a majority with some opposition by various of the instructors. Nevertheless, all of the instructors present left the building and went on strike. It is noted, however, that Gerrick, O'Neil, and Wigder were not present during the strike vote as they had been suspended. Also, another employee, Leonard Giacolone, was not present as he was on sick leave at the time. As to the decision to strike, Gerrick testified that as far as he was concerned the majority ruled and therefore he supported the strike. Similarly, there is no evidence to indicate that Wigder, O'Neil, or Giacolone indicated to either the Union or to the Company that they did not support the strike or were willing to go to work notwithstanding the strike. In this regard, the record indicates that they, too, had participated in past strikes against the Company.

On Thursday, February 14, Davies returned and a meeting was held by the Company. After discussing the various options open to them, it was decided to terminate all of the instructors, including Gerrick, O'Neil, Wigder, and Giacolone for engaging in the strike. It also was decided to rescind the collective-bargaining agreement. In this respect, the testimony was that in making this decision it was noted that the Union had decided not to grieve the suspensions of the three employees and that past injunctions against the Union did not seem to inhibit midcontract strikes. Thus, although it was determined that the school would have to be closed for a substantial period of time, that new instructors would have to be hired and trained, and that substantial revenues would be lost, the Company opted to discharge the strikers and cancel its contract with the Union. It also appears that, as a decision was made to discharge the instructors, including the three who had been suspended because of the strike action, the suspensions themselves were not discussed at this meeting, and no decision was ever made on that matter. On that day a letter was sent to Gerrick, as president of the Union, which read as follows:

As you are well aware, in recent years the Union and its members have repeatedly reacted to grievances by engaging in strikes and other work stoppages. The School has consistently and vehemently objected to these illegal tactics, pointing out that the Labor Contract expressly provides a grievance and binding arbitration mechanism for resolving such matters, and expressly prohibits strikes and other work stoppages in such circumstances.

Due to the blatant illegality of such strikes and the Union's absolute unwillingness to abandon the use of this illegal tactic, the School has been forced on several occasions to turn to the courts for relief. Most recently, in June of 1978, the School was required to obtain an injunction from the Superior Court ordering the Union to cease an illegal strike. As a clear example of their total disregard for the law, the Union and its members ignored the injunction and the School was required to return to court for contempt proceedings.

Then, in October of 1978, the Union and its members again illegally struck over a grievance, and the School gave unequivocal notice that it had exhausted its ability to tolerate the Union's disdain for the contract and the law. I personally wrote to the Union on October 17, 1978, clearly and unambiguously stating the School's position. I also expressly advised that I would no longer tolerate the refusal by the Union and its members to honor the contractual grievance and no-strike provisions. I also expressly advised that any future non-compliance would be met with severe disciplinary action and that the School would have no recourse but to exercise its right to declare the entire Labor Agreement null and void.

It has now become crystal clear that the Union and its members are totally irresponsible and have

[8] According to Muller, when the Local Union, which is comprised exclusively of employees of the Company at the school in question, seeks advice, it is from Fallon. Muller also testified that the Local Union has access to legal counsel through Fallon.

absolutely no intention of abiding by their contractual and legal obligations. On the evening of February 12, 1980, three employees engaged in blatant misconduct and were suspended by Mr. Alfieri pending my personal review of the incident. Despite the fact that the contractual grievance procedure expressly governs disciplinary matters and despite the explicit contractual no-strike provision, the Union and its members responded by walking off their jobs at the start of the business day on February 13, 1980. The strike has continued to date, and no grievance has been filed.

I am forced to conclude that the Union and its members, by their past and current actions, have absolutely no regard for either the Contract or the law. This is not an isolated incident, but rather another in a series of incidents which the Union and its members know full well is not countenanced by the Contract, the courts, or the School. I have made the School's position absolutely clear, but the Union has chosen to ignore all that I have said. Having put the Union on explicit notice of the School's intended actions in the event of another illegal strike, I now have no choice but to implement those actions.

Accordingly, all participants in the illegal strike are deemed to have forfeited any rights as employees and are being removed from the School's payroll as of the start of the business day on February 13, 1980. Appropriate notices of termination are now being mailed individually to the affected employees, together with their paychecks for work performed through February 12, 1980. The employees are also being given a copy of this letter for informational purposes. Additionally, the Union is officially notified that the School is hereby rescinding and cancelling the Labor Agreement in its entirety, effective immediately. Since the Union no longer represents a majority of the instructional employees, the School cannot continue to recognize the Union as a bargaining agent for the instructors.

I sincerely regret having to take this action. However, the Union and its members, by their consistent pattern of illegal conduct, have left the School with no other alternative. My earlier efforts to deal with this conduct through judicial and other means have obviously had no effect whatsoever on what has now proven to be a permanent case of irresponsibility and disdain for contractual and legal obligations.

Thereafter, on March 7, 1980, the Union filed grievances relating to the suspensions of Gerrick, Wigder, and O'Neil and the termination of the instructors. It appears, however, that both parties agreed to hold these grievances in obeyance pending the outcome of this case.

V. ANALYSIS AND CONCLUSIONS

There could be no dispute as to the fact that Gerrick, O'Neil, and Wigder breached company rules by leaving the premises without permission on the evening of February 11, 1980. Also, it is concluded that such a breach of company rules by other employees has, in the past, resulted in disciplinary actions taken against them, usually by warnings and dockings of pay. While the record herein does not indicate that a suspension would be the normal disciplinary measure for leaving the premises without permission during noninstructional time, the Company persuasively contends that such an absence during floating time is a more serious offense which should be treated more severely. In this respect, there does not appear to be any evidence of people being caught off the premises during floating time and therefore there are no incidences of disciplinary actions with which to make comparison. Nevertheless, because an instructor who is on floating status is supposed to be present when classes are in session and therefore available to substitute or assist in such classes, it seems reasonable to conclude that an instructor's presence at the school during floating time is more necessary than his presence during noninstructional time.

The evidence also establishes, contrary to the General Counsel's allegation, that Respondent temporarily suspended Gerrick, O'Neil, and Wigder pending Davies' return when a final determination was to be made regarding their discipline. Thus, I do not believe that the evidence supports the allegation in the complaint that these three men were indefinitely suspended pending discharge, an allegation which implies that their discharges were inevitable. On the contrary, the evidence indicates to me that when Alfieri suspended these instructors his intention was simply to defer the final decision to his superior, Davies, who was expected to return in 3 days. While it is true that Alfieri did indicate to the three individuals, in response to a question, that termination was a possibility (as explicitly provided in the Company's rules), it is abundantly clear that neither he nor any other of Respondent's agents had made a decision to terminate these men at the time they were suspended on February 11. Indeed, if one looks at the past history of the dealings between the Union and the Company on disciplinary matters, it is equally and perhaps more likely that, when a final determination had been made as to the disciplinary action to be taken, the result, after a grievance had been filed, would have been to reduce the suspensions. In any event, it is evident to me that no final decision was ever made as to the type of discipline to be imposed upon Gerrick, O'Neil, and Wigder because of the intervention of the strike and the Company's reaction to that situation.

It is, as noted above, the General Counsel's theory that the suspensions of Gerrick, O'Neil, and Wigder were motivated by a plan to oust the Union as devised by Alfieri. Thus, conceding that Gerrick, O'Neil, and Wigder did breach a major company rule, and being aware that similar breaches have resulted in disciplinary action, the General Counsel nevertheless contends that the suspensions were too harsh a penalty and were motivated by discriminatory reasons. I must say that, if Respondent had discharged the three individuals for the conduct engaged in, I would be far more sympathetic to the General Counsel's argument that they received disparate treatment. However, as they merely were temporarily sus-

pended for 3 days, it seems to me that the argument of disparate treatment has little weight. Therefore, I see as crucial to the General Counsel's case the existence of the "plan," without which evidence of discriminatory intent would be sorely lacking.

As described herein, the plan is alleged to have surfaced during a conversation between Gerrick and Santangelo during a meeting held in the summer of 1979. According to Gerrick, there came a point in the meeting when a generalized discussion ensued as to the relationship between the Union and the Company, during which discussion Santangelo admitted that Alfieri had devised a plan to get rid of the Union by firing or suspending Gerrick, which would cause a strike in breach of the no-strike clause and therefore enabled Respondent to discharge all of the instructors.

I do not credit Gerrick's account of the above conversation. While it is no doubt true that the Company was aware and may have been previously advised, in connection with past contractually prohibited strikes, that it had the right to discharge strikers who breach the no-strike clause, the plan to get rid of the Union, as alleged to have been conceded by Santangelo, is one which would of necessity depend upon the Union's anticipated reaction and therefore was not self-effectuating. That is, the plan would require the cooperation of the opposing side for its success. Although it is within the realm of possibility that Santangelo could have related such a plan to Gerrick, it hardly seems plausible that a man in his position with a Company, which has had a relatively long-standing history of bargaining with the Union, would have done so. I am also unconvinced as to Gerrick's testimony because of the contradictions elicited from various of the people whom he allegedly told of his conversation with Santangelo immediately thereafter. Thus, for example, Kretzmer, who was on the Union's Executive Council, testified that he first heard of the plan when he was told of it by Gerrick on February 12 or 13, 1980, after Gerrick had been suspended. Also, Gommel testified that, although Gerrick told him of his conversation with Santangelo, Gerrick did not relate a plan as described in the latter's testimony. Indeed, he testified that, whatever Gerrick may have said, it was not like what ultimately happened here or he "would have remembered it." Moreover, it would seem to me that, if such a plan had been announced to Gerrick by Santangelo and thereafter relayed by Gerrick to the members of the Union's Executive Council, when Gerrick was suspended, either he or the other officials of the Union would have made some mention of this plan during their discussions with management on February 11, 12, and 13. That is, if Gerrick was suspended pursuant to a previously determined plan to provoke a strike, and if Gerrick and the Union's officials were aware of the plan's existence as claimed, it would seem likely that the Union, during its meetings with management to obtain the reinstatement of Gerrick, O'Neil, and Wigder, would, at the very least, have expressed their awareness of the plan and accused the Company of carrying it out. Yet this never happened and the Union's silence on this score is indicative to me that the testimony regarding their awareness of the plan is, in reality, an afterthought.[9] Finally, on demeanor grounds I note that Respondent's witnesses, including Santangelo, impressed me as being forthright and honest.

To further supplement his contention that a plan did exist, the General Counsel relies on the testimony of certain witnesses concerning a number of ambiguous conversations. Thus, Gommel testified that in the summer of 1978 he had a conversation with Alfieri, wherein Alfieri in talking about the relationship between the Union and the Company, mentioned that there "would be more blow ups in the future and more problems." He also testified that in the summer or fall of 1979 he had a conversation with Connolly wherein the latter said that the Company could not live with the contract, that Gerrick and Alfieri were like "two bulls butting heads," and that Alfieri was on a crusade. In that same conversation, however, when Gommel mentioned that there were procedures under the contract enabling the school to terminate inadequate instructors, Connelly's response was, in effect, that the Company could not fire anyone. Finally, Gommel testified that sometime in the Fall of 1979 in a conversation with Puzio, the latter said that Alfieri wanted to be in a position to control the situation with the Union. As to this conversation, Gommel's testimony was exceedingly vague.

Although the alleged statements by Puzio and Connelly were denied by them, it seems to me that, even if I credited Gommel's testimony, his evidence is not supportive of the General Counsel's theory regarding the existence of a plan to discharge or suspend Gerrick in order to provoke a strike. At best, his testimony merely indicates that the existence of a personality conflict between Alfieri and Gerrick and the existence of bad feelings between the Company and the Union. Nothing contained in the alleged statements by Puzio or Connelly indicates the existence of a plan, and, in fact, Connelly's statements would appear to negate such a plan, as the tenor of his remarks was that it was impossible for the Company to discharge any of the instructors.

The General Counsel also places heavy reliance on the testimony of Heidenthaler regarding two alleged conversations he had. In the first, Heidenthaler testified that he volunteered to take over the class of an absent instructor and was told by Connelly that he could not do so be cause the Union would object. He stated that, when he pursued his request with Alfieri, he said that the contract would not present a problem, whereupon Alfieri responded by saying, "[D]amn right, it won't shortly." As to the second conversation, Heidenthaler testified that on the morning of Tuesday, February 12, while the instructors were holding their meeting in the lounge, he was in Hilco's office when Puzio and Alfieri entered. He testified that, when he indicated that there was a possibility of a strike, Puzio said, "This time we're right; we hold all the cards; and if they don't realize it they're going to find out the hard way. . . . [A] couple of weeks in the street may help straighten this matter out. We want that." Heidenthaler also stated that Alfieri then said, "[I]f

[9] See *W. T. Grant Company*, 214 NLRB 698, 699 (1974).

they walk out, I'm going to throw the book at them and take care of the whole bunch at one time."

As to the first of these conversations, even if I credit Heidenthaler, Alfieri's comment to the effect that the contract would soon not present a problem is decidedly ambiguous and does not support the theory that he was expressing an intention to cause a situation where the contract could he canceled. It must be recalled that the contract was in the final year of its term, and therefore was "soon" to expire. Assuming, *arguendo*, that he made this ambiguous remark, it is more plausible that his intention was to express the opinion that, when the contract expired, the Company intended to ask for concessions during negotiations. The second conversation is, however, somewhat more troublesome and is specifically denied by Alfieri and Puzio, who testified that they did not go to Hilco's office at all on the morning of February 12, 1980. In this respect, I am inclined to credit the testimony of Puzio and Alfieri. They mutually corroborated each other's testimony on this and other matters, and in both cases they generally appeared to be candid and forthright witnesses. Given the uncorroborated testimony of Heidenthaler and my observation of the demeanor of the witnesses, I shall therefore credit the testimony of Puzio and Alfieri as to their denials of this conversation.

Based on the above, it is therefore concluded that the General Counsel, has failed to sustain his burden of proof as to the existence of a plan to discharge or suspend Gerrick and to thereby provoke a midcontract strike. The evidence herein establishes that Gerrick, O'Neil, and Wigder admittedly breached a published company rule, which O'Neil conceded could result in their suspensions. The evidence further establishes that the Company temporarily suspended the three men pending final determination of their discipline when Davies was scheduled to return on Thursday, February 14, 1980. It is my opinion that the evidence in this case does not establish that the temporary suspensions meted out to the individuals in question on February 11 were of such a nature as to warrant the conclusion that they had been treated in a disparate manner. I therefore conclude, based on the record as a whole, that the temporary suspensions of Gerrick, O'Neil, and Wigder were not motivated by discriminatory reasons, but rather were imposed for good cause.

Because I have concluded that the suspensions of Gerrick, O'Neil, and Wigder did not constitute unfair labor practices, the strike which ensued on Wednesday, February 13, to protest their suspensions cannot be concluded to be an unfair labor practice strike. Moreover, as the strike occurred during the life of the collective-bargaining agreement containing no-strike and arbitration clauses, and as arbitration could have been invoked by the Union, it therefore is determined that the strike constituted a material breach of the contract. Accordingly, the strikers were not engaged in protected activity and Respondent was therefore at liberty to discharge them. *Mastro Plastics Corporation and French-American Reeds Manufacturing Company* v. *N.L.R.B.*, 350 U.S. 270 (1956); *Arlan's Department Store of Michigan Inc.*, 133 NLRB 802 (1961); *The Dow Chemical Company*, 244 NLRB 1060 (1979).[10] It is therefore concluded that the discharge of the instructors who engaged in the strike which commenced on February 13 was not an unfair labor practice.

As to Gerrick, Wigder, O'Neil, and Giacolone the issue of their discharges is somewhat more complicated because, although the reason they were discharged was due to the Company's belief that they supported the strike, the evidence indicates that they did not actually engage in the strike. However, as conceded by Gerrick, he did in fact support the strike, for, as he put it, "[T]he majority rules." Also, given the fact that O'Neil was a current officer of the Union and that Wigder was the past president, and also given the history of prior strikes in breach of the contract, it was reasonable for the Company to conclude that these men, including Giacolone, supported the strike. It is noted in this respect that none of them disavowed the strike. Under these circumstances, I therefore find that Respondent did not violate the act when it discharged Gerrick, Wigder, O'Neil, and Giacolone. *Bethlehem Steel Corporation*, 252 NLRB 982 (1980); *Bechtel Corporation*, 200 NLRB 503 (1972).

The next issue for consideration is the 8(a)(5) allegation. The General Counsel alleges that Respondent violated Section 8(a)(5) of the Act when it rescinded the collective-bargaining agreement and withdrew recognition from the Union on February 15, 1980. However, since the Union engaged in a strike rather than utilizing the grievance-arbitration procedures to resolve the matters giving rise to the strike, in circumstances where Respondent had expressed its willingness to have these matters submitted to the grievance machinery, it is my opinion that the Company was well within its rights when it rescinded the collective-bargaining agreement because of the Union's material breach of contract. *Marathon Electric Mfg. Corp.*, 106 NLRB 1171 (1953), affd. *sub nom. United Electrical, Radio & Machine Workers of America (UE), Local 1113* v. *N.L.R.B.*, 223 F.2d 338, 341 (D.C. Cir. 1955). Cf. *The Dow Chemical Company, supra*. This conclusion is further buttressed by the past history of the parties, which shows that the Union has continually ignored its contractual commitment not to engage in strikes over grievable matters, and in one instance even ignored an injunction granted by a court.

The complaint alleges and Respondent's answer admits that the Company withdrew recognition. Nevertheless, Respondent, in its brief, contends that it has not, in fact, refused to bargain with the Union. While acknowledging

[10] In *The Dow Chemical Company*, a majority of the Board, on remand from the Third Circuit Court of Appeals, held that a strike is unprotected when it is conducted in breach of a no-strike clause over a matter subject to the grievance-arbitration provisions of the contract, unless the strike is provoked by an employer's "serious" unfair labor practices. Chairman Fanning and Member Jenkins, however, would have overruled *Arlan's Department Store of Michigan Inc., supra*, to the extent that a strike, if caused by any employer unfair labor practices, would constitute protected activity for which the strikers could not be discharged. A majority of the Board concluded in *Dow Chemical* that the employer violated Sec. 8(a)(3) of the Act when it discharged the striker in question. On November 26, 1980, the Third Circuit Court of Appeals refused to enforce the Board's decision in that case, and concluded that the strikers in question were not engaged in protected activity and that the employer acted in a lawful manner when it discharged them 636 F.2d 1352.

that the Company recinded the collective-bargaining agreement and also the fact that Davies expressly notified the Union that the Company was withdrawing recognition, Respondent argues that, since the strike commenced, it has never been notified by the Union of the Union's desire to bargain. Therefore, Respondent argues that it has never refused to bargain. It seems to me, however, that, given the express withdrawal of recognition by the Company on February 15, further demands for bargaining by the Union would have been futile.

Nevertheless, and despite the withdrawal of recognition, it is concluded that a bargaining order would not be appropriate in the circumstances herein. In this case the Union's strike on February 13 resulted in the lawful discharge of all the instructors comprising the bargaining unit and the concommitant lawful rescission of the collective-bargaining agreement. When these actions were taken, the school was closed for a period of time, during which an entirely new staff of instructors had to be hired and trained.[11] As to these newly hired instructors, it is completely unknown what desires they have for union representation. In these circumstances, I do not believe that a bargaining order would be appropriate and I shall decline to grant one. *Arkay Packaging Corporation*, 227 NLRB 397 (1976).

[11] At the time of the hearing, the school had not yet resumed full operations.

CONCLUSIONS OF LAW

1. Lincoln Technical Institute, Inc., is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. Lincoln Technical Institute Federation of Teachers, Local 2322, A.F.T., AFL-CIO, is a labor organization within the meaning of Section 2(5) of the Act.

3. Respondent has not engaged in any conduct in violation of the Act.

Upon the foregoing findings of fact, conclusions of law, and the entire record in this proceeding, and pursuant to Section 10(c) of the Act, I hereby make the following recommended:

ORDER[12]

It is hereby ordered that the complaint be dismissed in its entirety.

[12] In the event no exceptions are filed as provided by Sec. 102.46 of the Rules and Regulations of the National Labor Relations Board, the findings, conclusions, and recommended Order herein, shall, as provided in Sec. 102.48 of the Rules and Regulations, be adopted by the Board and become its findings, conclusions, and Order, and all objections thereto shall be deemed waived for all purposes.